No. 01-277

Supreme Court, U.S.
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In The Supreme Court of the United States

CARMEN LEVERETTE,

Petitioner,

v.

MARGARET BELL, in her individual capacity,

Respondent.

and

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

Defendant.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fourth Circuit's decision in this case establish a general principle of Fourth Amendment law, which conflicts with the Second Circuit's decision on the same constitutional issue?

2. Does the Fourth Circuit's analysis of the qualified immunity issue in this case implicate an important question of federal jurisprudence, and conflict with decisions from this Court and other circuits?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 7

TABLE OF AUTHORITIES

Doe v. McMillan, 412 U.S. 306 (1973) 4

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 4

In re Allen, 106 F.3d 582 (4th Cir. 1997) 4

Lenz v. Winburn, 51 F.3d 1540 (11th Cir. 1995) 4

Long v. Norris, 929 F.2d 1111 (6th Cir. 1991) 4

Katz v. United States, 389 U.S. 347 (1967) 1, 6

Security and Law Enforcement Officers v. Carey, 737 F.2d 187 (2nd Cir. 1984) 1, 2, 3, 6

Warden v. Hayden, 387 U.S. 294 (1967) 1, 6

The Fourth Circuit's decision in this case establishes a general principle of Fourth Amendment law that directly conflicts with the Second Circuit's decision on the same constitutional issue.

Respondent contends the Petition should be denied because Fourth Amendment analysis is "inherently fact-driven," and the Fourth Circuit's decision in this case represents nothing more than different factual determinations from those at issue in *Security and Law Enforcement Employees v. Carey*, 737 F.2d 187 (2nd Cir. 1984). Taken to its logical conclusion, the result of Respondent's argument is the absence of any underlying legal principles governing Fourth Amendment issues, and courts need look no further than the facts of the case before them when confronted with a Fourth Amendment challenge. Such a result defies all understanding of Fourth Amendment jurisprudence.

There are certain underlying principles of constitutional law that apply regardless of a particular fact situation. For instance, as a general rule, in the absence of exigent circumstances, the Fourth Amendment requires government officials to obtain a warrant before searching someone who is not under arrest. *Katz v. United States*, 389 U.S. 347 (1967); *Warden v. Hayden*, 387 U.S. 294 (1967). Thus, when faced with a Fourth Amendment challenge to a warrantless search, courts must analyze the facts of the particular case in light of that general rule.

In this case, the question of law at issue is what standard applies (probable cause or reasonable suspicion) to visual body cavity searches of prison employees. The Second Circuit expressly held that

probable cause is required, while the Fourth Circuit has now held that prison officials need only have a reasonable suspicion before conducting such searches.

The Second Circuit decided the question of law in *Carey* by holding that warrantless visual body cavity searches of prison employees are unconstitutional. Since it was undisputed that prison officials did not obtain warrants prior to conducting the searches, the facts surrounding the actual searches were basically irrelevant to the Fourth Amendment analysis. The court held the searches were unconstitutional, and the only factual questions went to the qualified immunity issue. Even though seventeen years have passed, *Carey* is still the law in the Second Circuit, and absent exigent circumstances, prison officials in that circuit must obtain a warrant before subjecting an employee to a visual body cavity search.

There can be no doubt that the search at issue in this case was unconstitutional under the *Carey* analysis. As a result of the Fourth Circuit's decision, however, prison officials in this circuit are never required to obtain a warrant to conduct a visual body cavity search of an employee, but need only articulate a reasonable suspicion.

Respondent attempts to downplay the significant conflict between the circuits on this fundamental constitutional issue by asserting that the sole issue before the Fourth Circuit in this case was whether Respondent was entitled to qualified immunity. While the qualified immunity issue was the only issue addressed by the district court, and briefed by the parties before the Fourth Circuit, the Fourth Circuit's decision goes far beyond the qualified immunity issue.

Rather, it establishes a general principle of Fourth Amendment law that is not dependent on the particular facts of this case, but directly implicates the constitutional rights of countless prison employees.

By specifically prohibiting body cavity searches of prison employees, the State of South Carolina recognized that body cavity searches are inherently demeaning and indecent, and acknowledged that its prison employees had a legitimate expectation to be free from such searches. A general recognition of this expectation of privacy may well explain the lack of case law on the issue since *Carey* was decided in 1984.

The Fourth Circuit has now usurped that recognized expectation of privacy, however, and established a general principle of law directly contrary to the principle established by the Second Circuit in *Carey*. Prison employees in the Fourth Circuit are no less entitled to Fourth Amendment protection than the prison employees in the Second Circuit. Granting the Petition will allow this Court to resolve the conflict created by the Fourth Circuit's decision.

The Fourth Circuit's analysis of the qualified immunity issue in this case involves an important question of federal jurisprudence, and its holding on this issue conflicts with decisions from this Court and other circuits.

Respondent also asserts that this Court should not review the Fourth Circuit's holding that she was entitled to qualified immunity, because the issue does not involve an important question of federal law, or a conflict among the circuits. Contrary to this assertion, the Fourth Circuit's analysis directly

impacts the qualified immunity analysis in federal court actions against state officials. Further, its analysis and ultimate conclusion are contrary to decisions from this Court and other circuit courts.

As a threshold matter, before government officials may be shielded from individual liability for damages arising from acts in their official capacity, their conduct must be within the scope of their discretionary authority. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *In re Allen*, 106 F.3d 582, 593 (4th Cir. 1997). Regulations and statutes governing an official's position will most often govern the scope of his authority. *Doe v. McMillan*, 412 U.S. 306, 321-324 (1973) (official's authority defined by statutes dictating duties of the Public Printer and Superintendent of Documents); *Allen*, 106 F.3d at 595 (statutes regarding duties of state attorney general defined scope of authority); *Lenz v. Winburn*, 51 F.3d 1540, 1546-47 (11th Cir. 1995) (Florida statutes and training manual for Florida guardian ad litem program defined scope of guardian ad litem's authority); *Long v. Norris*, 929 F.2d 1111, 1116-18 (6th Cir. 1991) (qualified immunity did not bar suit against prison officials who violated prison regulations prohibiting strip searches without probable cause).

Thus, under the case law cited above, the scope of Respondent's authority to conduct and supervise employee searches was defined by the policies governing her position as assistant warden. Those policies significantly limited the scope of her discretionary authority regarding employee searches in general, and expressly prohibited body cavity searches of employees. Contrary to the Fourth Circuit's finding that it was "not clear" Respondent violated the policies when she ordered and conducted

the visual body cavity search at issue, it is abundantly clear from the unambiguous policy language, as well as the testimony in the record, that employee body cavity searches were prohibited, and the Respondent was well aware of the limitations regarding the scope of her authority.

The Fourth Circuit expressly based its conclusion regarding the scope of Respondent's authority on its finding that "assistant wardens of correctional facilities routinely supervise searches." (Appendix at p. A-9). Moreover, the court indicated that it did not consider the SCDC policies in defining the scope of Respondent's authority. Id. Thus, in the context of its qualified immunity analysis, the Fourth Circuit clearly ignored the applicable policies.

Since Respondent exceeded the scope of her authority as determined by the policies governing her position, she is not entitled to the qualified immunity defense as a matter of law. Respondent contends she is entitled to the defense's protection, however, because her conduct did not violate a clearly established constitutional right. (Br. in Oppo., pp. 7-8). The Fourth Circuit specifically declined to reach this issue in light of its holding that the search at issue was constitutionally valid. (Appendix at page A-15).

Respondent's argument requires an assumption that in the absence of case law clearly establishing otherwise, warrantless body cavity searches of prison employees are "reasonable" as a matter of law for qualified immunity purposes. Fortunately for United States residents, the opposite is true. Fourth Amendment analysis starts with the general proposition that in the absence of exigent

circumstances, such intrusive searches require probable cause and prior judicial approval.[1] *Katz*, supra; *Warden*, supra.

In 1984, the Second Circuit held that prison employees have a legitimate expectation they will not be subjected to visual body cavity searches without prior judicial approval. This general principle of Fourth Amendment law was apparently so undeniable that no court held otherwise until the Fourth Circuit issued its decision in this case.

In 1992, the South Carolina Department of Corrections implemented a policy recognizing its employees' legitimate expectations of privacy regarding body cavity searches, and specifically prohibited such searches. Even if Respondent was not aware of the *Carey* decision, the prison employees' legitimate expectations of privacy regarding body cavity searches were embodied in SCDC's policies, of which she was well aware. Consequently, she cannot legitimately assert ignorance regarding the constitutional issue before the Court.

Case law clearly establishes that courts must consider applicable statutes, rules, regulations and policies, to determine the scope of an official's discretionary authority in the context of a qualified immunity analysis. The Fourth Circuit expressly ignored the applicable policies in this case in holding that Respondent acted within the scope of her discretionary authority when she ordered and conducted the visual body cavity search at issue. Granting the Petition will afford the Court an

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[1] Respondent does not, and could not, contend there were exigent circumstances in this case that precluded prior judicial approval of the search at issue.

opportunity to resolve the question of what courts must consider in determining the scope of an official's discretionary authority.

CONCLUSION

Based on the foregoing, and the arguments set forth in the Petition, the Petitioner Carmen Leverette respectfully submits that the Petition should be granted, and the Fourth Circuit decision should be reversed.

This the 27th day of September, 2001.

Respectfully Submitted,

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